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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 203

P. F. PETERSEN BAKING COMPANY, SCHULZE BAKING COMPANY, CONTINENTAL BAKING COMPANY, GENERAL BAKING COMPANY, QUAKER BAKING COMPANY, CORPORATIONS, FOR THEMSELVES AND OTHERS SIMILARLY SITUATED, APPELLANTS (PLAINTIFFS),

vs.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, AND DWIGHT F. FELTON, AS DEPUTY SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF NEBRASKA, APPELLEES (DEFENDANTS).

BRIEF OF APPELLANTS.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Nebraska in this case was rendered on the 2d day of March, 1933. It is not

yet officially reported, but appears as *P. F. Petersen Baking Company, et al.*, v. *Charles W. Bryan, as Governor of the State of Nebraska, et al.*, in the 247 Northwestern, page 39, and in the printed record in this case at pages 44 to 49, inclusive.

II.

Jurisdiction.

On the 1st day of June, 1933, Appellants served on Appellees and presented to the Supreme Court of Nebraska their statement as to jurisdiction on appeal in this Court, and on the 9th day of October, 1933, this Court made a finding that probable jurisdiction was noted.

The statutory provisions relied upon to sustain jurisdiction in appellants' statement as to jurisdiction on appeal, are found in the Act of February 13, 1925, Chapter 229, Section I, 43 Stat. 937 (U. S. C. A., Title 28, Sec. 344(*a*), the same being Section 237(*a*) of the Judicial Code as Amended) and the Act of February 13, 1925, Chapter 229, Section 10, 43 Stat. 941, as amended by the Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54, and the Act of January 31, 1928, Chapter 14, Section 2, 45 Stat. 54, as amended April 26, 1928, Chapter 440, 45 Stat. 466, (U. S. C. A. Title 28, Sections, 861, 861(*a*) and 861(*b*)).

III.

Statement of Case.

The 1931 Legislature of Nebraska enacted House Roll 51 which thereupon became commonly known as the "Nebraska Standard Bread Loaf Law," and which appears as "Chapter 162 of the Laws of Nebraska, 1931, and Special Session, 1931." This statute is as follows:

Chapter 162.

Establishing a Standard Loaf of Bread.

House Roll No. 51.

Introduced by Representative Ed. A. Smith of Douglas.

AN ACT to establish a standard loaf of bread for the State of Nebraska; provide a penalty for the violation thereof; and to repeal Sections 89-142, 89-143, 89-144 and 89-145 Compiled Statutes of Nebraska, 1929.

Be it Enacted by the People of the State of Nebraska:

"Section 1. It shall be the duty of the department of agriculture to enforce all provisions of this act. It shall make or cause to be made all necessary examinations and shall have authority to promulgate such rules and regulations as are necessary to promptly and effectively enforce the provisions of this act.

"Sec. 2. Every loaf of bread made for sale in the State of Nebraska shall be of the following weights avoirdupois: One-half pound, one pound, one and one-half pounds, and also in exact multiples of one pound and of no other weights. Whenever twin or multiple loaves are baked, the weights herein specified shall apply to each unit of the twin or multiple loaf, provided that a twin one and one-half pound loaf may be made and sold, but units of said loaf must not be sold separately: Provided that none of the provisions of this act shall apply to fancy breads.

"Sec. 3. The Secretary of Agriculture shall prescribe reasonable tolerances or variations in excess, but not under the weights mentioned in the preceding section, within which all loaves shall be baked, and also the time for which said weights shall be maintained.

"Sec. 4. Any person, firm or corporation violating any of the provisions of this Act, shall be punished

by a fine of not less than ten dollars nor more than one hundred dollars.

"SEC. 5. That said Sections 89-142, 89-143, 89-144 and 89-145 Compiled Statutes of Nebraska, 1929, are hereby repealed.

Approved April 21, 1931."

Under the Constitution of Nebraska this statute would have become effective on the 2d day of August, 1931.

Pursuant to the statute above quoted the Deputy Secretary of Agriculture, no Secretary of Agriculture having been appointed, on June 24, 1931, ruled that a maximum tolerance of one ounce on half-pound loaves, two ounces on pound loaves and 10% on all larger loaves should be allowed. That the weight should be determined by averaging the weight of not less than five loaves of a given lot "if available," and that the tolerance should apply for a period of twelve hours after baking (R. 27).

On July 23, 1931, appellants filed a petition (R. 1 and 3-27) in the District Court of Lancaster County, Nebraska, attacking the statute and rules and regulations issued and asking an injunction against Charles W. Bryan, as Governor of the State of Nebraska, and Dwight F. Felton, as Deputy Secretary of the Department of Agriculture of the State of Nebraska, the officials charged with the enforcement of said statute. The basis of the petition is that the statute and the rules and regulations issued thereunder are contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that:

1. A maximum tolerance over the weights fixed by the statute, rules and regulations is arbitrary, discriminatory and void, serves no useful purpose, is not necessary for the protection of purchasers against imposition and fraud, is not calculated to effectuate that purpose and subjects

bakers and sellers of bread to restrictions which are unreasonable and arbitrary.

2. The unlimited power vested by the statute in the Secretary of Agriculture, a ministerial officer, to prescribe excess tolerances, to fix the time for which weights must be maintained, and to define "fancy breads," is unreasonable and arbitrary.

3. The provisions of the statute, rules and regulations with respect to the time, place, possession and particular loaves of bread required to comply with the statute, subjects the appellants to a fine for violation of the statute irrespective of any negligence on their part and is an unreasonable and arbitrary restriction upon their right to do business.

4. That the statute and the rules and regulations adopted thereunder provide tolerances which are impossible of performance, and arbitrarily require the maintenance of loaves of bread within this tolerance for an impossible length of time.

5. That the term "fancy breads" used in the statute, rules and regulations, which describes no known commodity, and the provisions of the statute prohibiting the manufacture (but not the sale) of a loaf of bread differing from the standard weights, and the failure of the statute, rules and regulations to define the crime of manufacturing overweight bread are not sufficiently explicit to inform appellants what condition will make them liable to the penalties of the statute, are so vague that men of common intelligence must of necessity guess at their meaning and lack the definiteness and certainty required of penal statutes creating a new offense.

6. That the statute and rules and regulations prevent the baking of a twenty-ounce loaf of bread which is a popular

and economical loaf, and that the barring of this loaf is an arbitrary and unreasonable restriction on appellants' right to do business.

On July 23, 1931, the court issued a temporary restraining order against appellees, their agents and employees. Appellees filed no answer on August 24, 1931, the date when the answer was due. Appellants' testimony was taken in the case on September 22, 1931 (R. 59 to 315). Then on September 30, 1931, appellees filed an answer (R. 27), admitting the corporate existence of the appellants, the official capacity of the appellees, the passage of the statute, the intention of appellees to enforce the statute, that there was no Secretary of Agriculture in Nebraska, and the fact that the statute prohibited a twenty ounce loaf of bread; denied the other allegations in the petition, and set up that on Sepember 19, 1931, while the restraining order in this case was in effect that the appellee, Deputy Secretary of Agriculture had adopted without notice some changed or additional rules and regulations, by which rules and regulations the excess tolerance was fixed at three ounces on pound loaves and other loaves in direct proportion, minimum weights were required to be maintained for twelve hours after cooling and weights were to be determined by averaging the weight of not less than five loaves of a given unit "if available," and said weight provisions were not to apply to "fancy breads."

Appellants' reply challenged the constitutionality of the statute itself and both sets of rules adopted by the Deputy Secretary of Agriculture, and the right of the Deputy Secretary of Agriculture to adopt new rules when a restraining order was in force against him (R. 29).

By stipulation the evidence presented to the Court consisted of the same evidence as in the case of *Burns Baking Company, et al.*, v. *Bryan as Governor, et al.*, 264 U. S.

504, and the same evidence as in the case of *P. F. Petersen Baking Company, et al.*, v. *Weaver as Governor, et al.*, together with the depositions of witnesses relating to the present statute and the oral testimony of certain witnesses concerning the unknown meaning of the term "fancy breads."

On the 30th day of January, 1932, the District Court of Lancaster County upheld the constitutionality of the statute, rules and regulations and denied the injunction (R. 31-39). Motion for new trial was filed, overruled, and an appeal was taken to the Supreme Court of Nebraska.

On March 2, 1933, the Supreme Court of Nebraska affirmed the decision of the District Court of Lancaster County (R. 44), and on the 13th day of May, 1933, the Supreme Court of Nebraska overruled plaintiffs' (appellants) motion for rehearing (R. 52).

On the 1st day of June, 1933, the appellants duly served and filed their petition for appeal, assignment of errors and prayer for reversal (R. 52-55), together with appellants' statement as to jurisdiction on appeal. On said 1st day of June, 1933, the court made an order allowing the appeal (R. 55) and a further order fixing the bond at $1,000, which bond was on said day furnished, approved and filed, and which was to act as a supersedeas (R. 56). On said 1st day of June, 1933, the court issued its citation to the appellees which was duly served and filed (R. 56), and on said day appellants duly served and filed their praecipe (R. 57). On the 26th day of June, 1933, appellants' appeal was duly filed with the Clerk of Supreme Court of the United States and the cause docketed as No. 203 and on the 9th day of October, 1933, this Court noted probable jurisdiction of the case.

IV.

Specification of Errors.

The assigned errors intended to be urged are as follows:

1. That the Supreme Court of Nebraska erred in finding and holding that the maximum tolerance over the weights fixed by the statute, rules and regulations adopted thereunder, did not violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and in holding that said maximum tolerance served a useful purpose, was necessary for the protection of purchasers against imposition and fraud, was calculated to effectuate that purpose, and that it did not subject bakers and sellers of bread to restrictions which are unreasonable and arbitrary, and was not an improper exercise of the police power of the state.

2. That the Supreme Court of Nebraska erred in finding and holding that the unlimited power to prescribe excess tolerances, the time for which weights must be maintained, and to define "fancy breads" vested by the statute in the Secretary of Agriculture, a ministerial officer, was reasonable and valid, and not contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

3. That the Supreme Court of Nebraska erred in finding and holding that the provisions of the statute and the rules and regulations adopted thereunder with respect to the time, place, possession and particular loaves of bread required to comply with the statute, the violation of any one of which, irrespective of negligence, under the statute, would subject the appellants to a fine, is reasonable and

valid and not an arbitrary restriction upon appellants' right to do business, and not in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

4. That the Supreme Court of Nebraska erred in finding and holding that said statute and rules and regulations adopted thereunder providing tolerances which were impossible of performance, and requiring the maintenance of loaves of bread within this tolerance for an unreasonable length of time, were not unreasonable and arbitrary and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

5. That the Supreme Court of Nebraska erred in finding and holding that the term "fancy breads" used in the statute, rules and regulations, which describes no known commodity, and the provisions of the statute prohibiting the manufacture (but not the sale) of loaves of bread differing from the standard weights, and the failure of the statute, rules and regulations to define the crime of manufacturing overweight bread, are sufficiently explicit to inform appellants what conditions will make them liable to the penalties of the statute and are not so vague that men of common intelligence must of necessity guess at their meaning but have the definiteness and certainty required of criminal statutes creating a new offense, and are not in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

6. That the Supreme Court of Nebraska erred in finding and holding that the statute, and the rules and regulations thereunder prohibiting the 20-ounce loaf of bread was a

valid exercise of the police power of the state, and not an arbitrary and unreasonable restriction upon appellants' right to do business, violating the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

7. That the Supreme Court of Nebraska erred in finding and holding that the appellants were not entitled to the injunction prayed for in their petition under the provisions of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

V.

Summary of Argument.

1.

A maximum tolerance for standard loaves of bread over the weights fixed by the statute, rules, and regulations is arbitrary, discriminatory, and void, serves no useful purpose, is not necessary for the protection of purchasers against imposition and fraud, and is not calculated to effectuate that purpose, but subjects bakers and sellers of bread to restrictions which are unreasonable and arbitrary, and is an improper exercise of the police power of the State.

Excess or maximum tolerances over standard weights for bread loaves serve no useful purpose, are not necessary for the protection of purchasers against imposition and fraud and are not calculated to effectuate that purpose, but subject bakers and sellers of bread to restrictions which are unreasonable and arbitrary.

Burns Baking Co. v. *Bryan,* 264 U. S. 504.

This law has been followed by all other courts considering excess tolerances over standard bread loaf weights except the Supreme Court of Nebraska.

P. F. Petersen Baking Co. v. *Weaver* (Appendix "A").

Holsum Baking Co. v. *Greene,* 45 Fed (2d) 238.

State v. *Curran,* 220 Ala. 4-6, 124 So. 909, 912.

State v. *Curran,* 23 Ala. App. 275, 124 So. 911.

Quaker Baking Co. v. *Herring,* 3 Fed. Sup. 118.

Wonder Bakeries Co. v. *White,* 3 Fed. Sup. 311.

2.

The unlimited power to prescribe excess tolerances, the time for which weights must be maintained, and to define "fancy breads", vested by the statute in the Secretary of Agriculture, a ministerial officer, is contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The delegation to a ministerial officer of unlimited power to legislate upon the essential elements of crime, is unconstitutional and void.

J. P. King Mfg. Co. v. *City Council of Augusta,* 277 U. S. 100.

Sultan Ry. & Timber Co. v. *Dept. of Labor & Industries,* 277 U. S. 135.

Pennsylvania R. Co. v. *Public Service Commission,* 250 U. S. 566.

Champlin Refining Co. v. *Corporation Commission,* 286 U. S. 243.

3.

The provisions of the statute, and the rules and regulations with respect to the time, place, possession and particular loaves of bread required to comply with the statute, the violation of any one of which provisions would, under the statute, subject and appellants to a fine irrespective of negligence, is a violation of the due process and equal protection clauses of the Fourteenth Amendment.

The provision of the statute and rules requiring the baker to maintain his loaf weights for twelve or fourteen hours after baking is unconstitutional and void.

Burns Baking Co. v. *Bryan, supra.*

The provision of the statute and rules permitting the bakers' bread to be weighed wherever found in order to determine criminality is unconstitutional and void.

P. F. Petersen Baking Co. v. *Weaver* (Appendix "A").

The provision of the statute which permits the weighing of the bakers' bread to determine criminality after it has left his possession is unconstitutional and void.

P. F. Petersen Baking Co. v. *Weaver, supra.*

No authority to repeal, extend or modify a statute is to be implied from the delegation of authority to enforce it.

United States v. 11,150 *lbs. Butter,* 195 Fed. 657.

The provision of the statute and rules and regulations which permits the criminality of a baker to be determined by the weight of a single loaf, or by averaging the weight of five loaves, "if available," is arbitrary and unreasonable.

Burns Baking Co. v. *Bryan, supra.*

4.

The provisions of the statute, rules and regulations fixing tolerances which are impossible of performance and which require maintenance of loaves of bread within this tolerance for an unreasonable length of time, are a violation of the due process and equal protection clauses of the Fourteenth Amendment.

It is impossible for the baker to manufacture loaves of bread which will weigh over a specified minimum weight and continue to hold that weight for twelve or fourteen hours after baking without often exceeding a two-ounce or three-ounce excess tolerance.

(Cases cited under Point 1.)

5.

The provisions of the statute, and the rules and regulations referring to "fancy breads", which describes no known commodity; the provisions of the statute prohibiting the manufacture (not the sale) of loaves of bread differing from the standard weight, and the failure of the statute and the rules and regulations to define the crime of manufacturing overweight bread, all in conjunction with the statute, a penal statute creating a new offense, are not sufficiently explicit to inform appellants what condition would make them liable to the penalties of the statute, and the statute and the rules and regulations are so vague that men of common intelligence must of necessity guess at their meaning, which is a violation of the due process and equal protection clauses of the Fourteenth Amendment.

The term "fancy breads" describes no known commodity.

The statutory provision delegating power to prescribe "reasonable" excess tolerances without fixing a measure of what is reasonable is indefinite and uncertain.

Champlin Refining Co. v. *Corporation Commission,* 286 U. S. 243.

L. & N. Ry. Co. v. *Commonwealth of Kentucky,* 99 Ky. 132, 35, S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457.

The failure of the statute to define the crime of manufacturing overweight bread subjects appellants to the uncertainty of regulations to be issued from time to time by a ministerial officer.

United States v. *L. & N. Railway Co.,* 176 Fed. 942.

The failure of the statute to fix the time for which excess tolerances shall apply subjects appellants to the uncertainty of regulations which require maintenance of minimum weights *after cooling* for twelve hours under *normal conditions.*

The terms "after cooling" and "under normal conditions" are indefinite and uncertain.

The statute and the rules and regulations, being indefinite and uncertain, are unconstitutional and void.

Connally v. *General Construction Co.,* 269 U. S. 385.

Smith v. *Cahoon,* 283 U. S. 553.

6 C. J. 871.

6.

The statute, and the rules and regulations thereunder, prohibiting a twenty ounce loaf of bread is not a valid exercise of the police power of the State, but is an arbitrary and unreasonable restriction upon appellants' right to do business and a violation of the due process and equal protection clauses of the Fourteenth Amendment.

The prohibition of the twenty-ounce loaf which is the size loaf in greatest demand with the consumers in Nebraska, is arbitrary and unreasonable.

Cooley's Constitutional Limitations (8th Edition) 1231.

Banghart v. *Walsh*, 339 Ill. 132.

Burns Baking Co. v. *Bryan, supra.*

7.

That the Supreme Court of Nebraska erred in finding and holding that the appellants were not entitled to the injunction prayed for in their petition under the provisions of the due process and equal protection clauses of the Fourteenth Amendment.

The statute and the rules and regulations being in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, as set forth in the preceding points, the Supreme Court of Nebraska erred in not issuing the injunction prayed for in the petition.

VI.

ARGUMENT.

Point 1.

A maximum tolerance for standard loaves of bread over the weights fixed by the statute, rules and regulations is arbitrary, discriminatory and void, serves no useful purpose, is not necessary for the protection of purchasers against imposition and fraud, and is not calculated to effectuate that purpose, but subjects bakers and sellers of bread to restrictions which are unreasonable and arbitrary, and is an improper exercise of the police power of the State.

Appellants and other bakers recognize that it is not only the right, but also the duty of the Legislature of Nebraska

to protect the consuming public from fraud and deceit by short weight loaves of bread. This legal principle was upheld by this Court in,

Burns Baking Co. v. *Bryan, supra.*
Schmidinger v. *Chicago,* 226 U. S. 578.

It is different, however, where the Legislature attempts to go beyond its power to prohibit short weight loaves, and couples with the minimum weight provision other provisions fixing maximum weights as well.

From the time of the earliest written records of the baking industry it has been the custom among bakers to vary the weight of the bread loaf in accordance with the variation in cost of ingredients. This custom was recognized in England during the 51st year of the reign of Henry III, A. D. 1266, when in volume 1, British Statutes at Large, page 47, an Act entitled, "An Assize of Bread and Ale," was adopted, providing among other things that the weight of a loaf of bread should be varied in accordance with the cost of a quarter of wheat, the quarter of wheat being a unit of dry measure. This continued to be the law of England until 1709, during the 8th year of the reign of Queen Anne, when it was amended, 12 British Statutes at Large, page 77, to provide that the weight of a loaf of bread should vary with the cost of a bushel of wheat, the bushel having become the unit of measurement. This statute, with its subsequent amendments, remained the law of England until the American Colonies separated from the mother country during the American Revolution. As a result similar laws and ordinances were adopted in the early history of the American States, notably a city ordinance adopted in the city of Washington, approved April 17, 1806, providing for the variation in weight of a loaf of bread in accordance with the cost of a bushel of superfine flour, the variation to be made in accordance with a proclamation to

be announced by the major at a stated time each month. A similar ordinance was in force in Mobile, Alabama, as late as 1847, and is referred to in *Mayor* v. *Yuille,* 3 Ala. 137.

The 1921 Nebraska Bread Weight law provided for a two ounce per pound excess tolerance, required maintenance of the loaves within this tolerance bracket for twenty-four hours after baking and provided that the weights should be determined by averaging the weight of not less than twenty-five loaves of the standard unit, and further provided that bread manufactured in the State must be weighed on the premises where manufactured. This Court held the maximum tolerance features of that law unconstitutional in *Burns Baking Co., et al.,* v. *Bryan, supra.*

The 1927 Nebraska Bread Weight law provided for a three and one-half ounce per pound excess tolerance, required the maintenance of the loaves within this tolerance bracket for twelve hours after baking or delivery to the retailer and provided that weights should be determined by averaging the weight of not less than five loaves of the standard units. This law was held unconstitutional by the United States District Court of Nebraska, three judges sitting, in *P. F. Petersen Baking Company, et al.,* v. *Weaver* (Unreported, Copy of Opinion as Appendix "A" herein).

The present statute provides the minimum weights for various standard loaves, and attempts to circumvent the above mentioned decisions by making it obligatory on the Secretary of Agriculture to provide excess tolerances and the time for which weights must be maintained. It contains no provision as to the number of loaves to be weighed nor as to the place of weighing, nor does it place any limit upon the Secretary of Agriculture as to the amount of tolerance he shall fix nor as to how long a time he shall require weights to be maintained.

On June 24, 1931, the Deputy Secretary of Agriculture, there being no Secretary of Agriculture in Nebraska, promulgated rules (R. 25-27) fixing a two ounce per pound excess tolerance and a 10% excess tolerance on larger loaves. This was a smaller tolerance on large loaves, and the same tolerance on the half pound and pound loaves, as that fixed by the 1921 law which was held unconstitutional in *Burns Baking Co., et al.* v. *Bryan, Supra.*

The rules of the Deputy Secretary of Agriculture further provided that these tolerances should be maintained for twelve hours after baking, and without statutory authority, he ruled that these weights should be determined by averaging the weight of not less than five loaves of a given standard unit "if available", in which particular more drastic limitation is placed on the baker than by the 1921 law considered in the *Burns* case where such weights were determined by averaging the weight of twenty-five loaves.

The bakers, unable to comply with this statute and the rules adopted by the Deputy Secretary of Agriculture, brought action in the District Court of Lancaster County, Nebraska, to enjoin the defendants from enforcing the statute and rules and to declare such statute and rules unconstitutional and void. The court issued a temporary restraining order pending hearing after the appellants had posted the bond required by the court.

There being no appreciable change in baking operation or methods it was stipulated by the parties that the evidence in this action should consist of the evidence adduced in the trial of the 1921 law in *Burns Baking Co.* v. *Bryan, Supra,* and of the evidence adduced in the trial of the 1927 law in *P. F. Petersen Baking Company* v. *Weaver, Supra,* supplemented by certain testimony relating to particular and peculiar provisions of this statute.

The answer of the appellees was due in the District Court of Lancaster County, Nebraska, on August 24, 1931. No answer being filed appellants proceeded to the taking of testimony on September 22, 1931. Then on September 30, 1931, appellees filed an answer in which they admit there is no Secretary of Agriculture in Nebraska, admit the passage of the act and the intention of the appellees to enforce it, admit that the statute prohibits the twenty ounce loaf, a popular weight loaf in Nebraska, and allege that on September 19, 1931, while the restraining order of the District Court was in full effect restraining the appellees, their agents and employees from enforcing the statute, the Deputy Secretary of Agriculture had adopted, without any notice whatever, some changed or additional rules and regulations (R. 28) which fixed the excess tolerance at three ounces per pound unit, provided that bread must maintain its minimum weight for twelve hours after baking, and further provided that weights should be determined by averaging the weight of not less than five loaves of a particular unit "if available".

This excess tolerance was smaller than the tolerance fixed by the 1927 law which was held unconstitutional in *P. F. Petersen Baking Co.* v. *Weaver, Supra,* and again the Deputy Secretary of Agriculture without legislative authority provided for averaging the weight of not less than five loaves "if available".

In their reply the appellants again challenged the constitutionality of the statute itself and both sets of rules adopted by the Deputy Secretary of Agriculture, and the right of the Deputy Secretary of Agriculture to adopt new rules when a restraining order was in force against him (R. 29).

The appellees offered no evidence except that of two witnesses who testified as to their conception of the meaning of the term "fancy breads", so that the case is before

this Court on the evidence adduced in the cases of Burns *Baking Co. v. Bryan, Supra,* and *P. F. Petersen Baking Company* v. *Weaver, Supra,* augmented by the evidence of the appellants' witnesses as to this particular statute.

Appellants contend that a maximum or excess tolerance over standard weights for bread serves no useful purpose, is not necessary for the protection of purchasers against imposition and fraud, and is not calculated to effectuate that purpose, but that it subjects bakers and sellers of bread to restrictions which are unreasonable and arbitrary.

On this identical testimony this Court previously held:

> "Admittedly, the provision in question is concerned with weight only. * * * Concretely, the sole purpose of fixing the maximum weights, as held by the Supreme Court, is to prevent the sale of a loaf weighing anything over nine ounces for a one-pound loaf, and the sale of a loaf weighing anything over eighteen ounces for a pound and a half loaf, and so on. * * * There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a 9½ or a 10 ounce loaf for a pound (16 ounce) loaf, or an 18½ or a 19 ounce loaf for a pound and a half (24 ounce) loaf; and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception. Imposition thru short weights readily could have been dealt with in a direct and effective way. For the reasons stated, we conclude that the provision that the average weights shall not exceed the maximums fixed, is not necessary for the protection of purchasers against imposition and fraud by short weights, *and is not calculated to effectuate that purpose,* and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary and is therefore repugnant to the Fourteenth Amendment." (Italics ours.)
>
> *Burns Baking Co.* v. *Bryan, Supra.*

The legal principle announced by this Court in the *Burns* case has been uniformly followed in later cases, the Su-

preme Court of Nebraska in this case being the only exception.

The 1921 Ohio Bread Weight law provided a tolerance of one ounce above and one ounce below the standard weights, required maintenance within this tolerance for twelve hours and provided that weights should be determined by averaging the weight of not less than twenty-five loaves of any one of the standard units. The excess tolerance provision of this law was held unconstitutional by the United States District Court of Ohio, three judges sitting, in the following language:

> "Manifestly, considered as a proper exercise of the state's police powers, there is a distinction between a provision for a surplus tolerance and one for a deficiency. The latter is manifestly in the public interest as a safe-guard against imposition, and, moreover, observance of it entails no substantial embarrassment to the baker, whereas the *former, as observed in the Burns decision, serves the consuming public in no substantial manner,* and it is readily seen to be a definitely hampering *restriction in baking operations.* Moreover, if the bakers are right, as claimed in this case, that, because of the relation of operation and overhead expense to the cost of materials, it prevents passing to the consumer the latter's fair share of the lessened cost of materials, *its presence in the act is definitely against the public interest".* (Italics ours.)
>
> *Holsum Baking Co.* v. *Greene,* 45 Fed. (2d) 238.

The 1927 Nebraska Bread Weight law as previously stated, provided a tolerance of three and one-half ounces excess weight per pound, required the maintenance of the loaves within the tolerance for twelve hours after baking or delivery to the retailer and provided that the weights should be determined by averaging the weight of not less than five loaves of any one of the standard units. This law was held unconstitutional by the United States District

Court of Nebraska, three judges sitting, in *P. F. Petersen Baking Company* v. *Weaver, et al.* (Appendix "A").

The 1927 Alabama Bread Weight law prescribed standard weights and, as in this case, contained no provision as to the number of loaves to be weighed, nor as to the length of time during which weights must be maintained, but provided that the State Board of Agriculture should prescribe tolerances in excess and deficiency of the standard weights. The excess tolerance provision of this law was held unconstitutional by the Supreme Court of Alabama and by the Court of Appeals of Alabama in,

State v. *Curran,* 220 Ala. 4-6, 124 So. 909, 912.
State v. *Curran,* 23 Ala. App. 275, 124 So. 911.

The 1927 Iowa Bread Weight law prescribed standard weights for bread and delegated power to the Secretary of Agriculture to fix excess tolerances within limits of 10 per cent overweight and 4 per cent underweight, and, as in this case, contained no provision as to the number of loaves to be weighed nor as to the length of time during which weights must be maintained. The excess tolerance provision of this law was held unconstitutional by the United States District Court of Iowa, three judges sitting, in *Quaker Baking Company* v. *Herring et al.,* 3 Fed. Supp. 118.

These decisions follow the law laid down by this Court in the *Burns Baking Co.* v. *Bryan case,* that excess tolerances serve no useful purpose, are not necessary for the protection of the purchasers against imposition and fraud, are not calculated to effectuate that purpose, and subject bakers and sellers of bread to restrictions which are unreasonable and arbitrary.

In further considering the 1921 Ohio Bread Weight law, another United States District Court, three judges sitting,

again reasserts this principle of law. *Wonder Bakeries Company, Inc.* v. *White et al.*, 3 Fed Supp. 311.

The Supreme Court of Nebraska in this case has failed to follow the above authorities. In its opinion the Supreme Court of Nebraska holds that excess tolerances are necessary for the protection of the public against fraud and deceit and are not an unreasonable or arbitrary restriction upon the bakers' right to do business. A survey of the entire record shows that there is no evidence to support this conclusion.

In the Burns case, this Court held that there was no evidence to support the contention that purchasers have been or are likely to be induced to take a 9½ ounce loaf or 10 ounce loaf for a pound loaf, or a 18½ or 19 ounce loaf for a pound and a half loaf of bread, and that it is contrary to common experience and unreasonable to assume that there could be any danger of such deception. Upon the identical evidence the Supreme Court of Nebraska in this case holds that if a baker makes a loaf weighing 19½ ounces the purchasing consumer may be deceived into thinking that it is a one and a half pound loaf. The evidence in this case on this point is the identical evidence that was submitted to this Court in the Burns case and the finding of this Court on this same evidence is conclusive of the issue.

To permit the decision of the Supreme Court of Nebraska to stand as a final adjudication of the constitutional principle involved, upon the necessity and reasonableness of excess tolerances, is to create a variance in interpretation of the Federal Constitution, and a ruling contrary to the principles stated not only in the Burns case decided by this Court but in the other cases above referred to which have followed the same rule.

Point 2.

The unlimited power to prescribe excess tolerances, the time for which weights must be maintained, and to define "fancy breads," vested by the statute in the Secretary of Agriculture, a ministerial officer, is contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Nebraska has announced in this case that it is a part of the settled policy of the State to delegate legislative authority to an administrative body and that such a delegation of legislative power as took place in this statute does not violate the constitutional provisions of Nebraska relating to the distribution of powers between the legislative, executive and judicial branches.

This declaration by the Supreme Court of Nebraska is beside the issue in this case, however, as the point raised by appellants is that no constitutional power exists in the legislature to fix excess tolerances, and that the legislature cannot delegate power to another to do that which it cannot do itself. If no constitutional power exists to fix excess tolerances, clearly any rules regarding excess tolerances are also void. If the legislature can circumvent the constitutional safeguards by delegating unrestricted power to an individual and the guaranties of the Constitution be thereby avoided, the citizen is without protection.

Appellants contend that even if the delegation of legislative authority be valid under the constitutional provisions of Nebraska relating to the division of governmental functions, that any unrestricted delegation of power to fix the necessary elements of crime as attempted in this statute is a violation of the due process and equal protection clauses

of the Fourteenth Amendment to the Constitution of the United States.

In the Ohio, Iowa and Alabama bread weight laws referred to in Point 1, an attempt to delegate authority to fix excess tolerances was granted by the statute to an administrative officer. In each instance, however, a definite limitation was placed upon the power of the administrative officer, while in the present Nebraska statute no limitation is placed upon the Secretary of Agriculture as to the excess tolerance to be fixed nor as to the length of time he shall fix during which weights must be maintained, other than that he must make an excess tolerance and shall fix a length of time during which weights must be maintained.

In the Ohio, Iowa and Alabama statutes all excess tolerances were held unnecessary and unconstitutional as set forth in the Argument under Point 1.

While appellants feel that the arguments raised under Point 1 are decisive of this case, assuming that, in the present statute, it was constitutional to fix excess tolerances and to make it a crime to manufacture bread which exceeds the tolerance weight or to make bread which is either above or below the standard weight at any time within a fixed number of hours after baking, it is necessary that these elements of the crime must be created by some legislative action on the part of the Secretary of Agriculture, since the statute fails to so provide.

The statute as enacted by the legislature created certain standards for the minimum weights of bread loaves, provided that these weights should not apply to "fancy breads," and established penalties for violation. This meagre skeleton the Deputy Secretary of Agriculture attempted to clothe with all the habiliments of a complete legislative enactment when, under an unlimited and unrestricted delegation of power, he fixed excess tolerances,

required maintenance of bread weights for twelve hours after baking and provided for determining weights by averaging the weight of only five loaves "if available." The crime of selling overweight bread was not established by the statute, but was created by rule of the Deputy Secretary of Agriculture. The offense of making for sale a loaf which becomes overweight or short weight, not when baked, but several hours thereafter, was not created by the statute, but by the rule of the Deputy Secretary of Agriculture.

In the attempted exercise of this legislative function on June 24, 1931, the Deputy Secretary of Agriculture, there being no Secretary of Agriculture in Nebraska, did fix a two ounce excess tolerance per pound loaf and required the maintenance of the loaves within the tolerance weights for twelve hours. Then on September 19, 1931, without any notice and while his enforcement of the statute and rules was enjoined by order of the District Court he adopted new rules increasing the tolerance to three ounces per pound loaf. On September 18, 1931, a loaf weighing eighteen and a half ounces was an illegal loaf and would subject the baker thereof to the penalties of the statute. The next day, without any action on the part of the baker, this same loaf became a lawful loaf. If it is possible for the Deputy Secretary of Agriculture to exercise his unrestricted power in increasing these tolerances, it is equally possible for him to reduce the tolerances or to entirely eliminate them. The Secretary of Agriculture by continuous changes in excess tolerances would so harass the baking industry as to render it impossible for the baker to operate.

The Supreme Court of Nebraska in this case held that the constitutionality of rules and regulations issued by the Deputy Secretary of Agriculture cannot be attacked in an action until a request is made that these rules be modified, and cites as authority for this conclusion the case of *Red*

"C" Oil Mfg. Co. v. *Board of Agriculture of North Carolina,* 222 U. S. 380. This same position is taken by appellees in their motion to dismiss for want of jurisdiction.

As stated elsewhere herein, this is not an issue in the case at bar, because

First. Appellants challenge as unconstitutional and in violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, an Act of the 1931 Legislature of the State of Nebraska, heretofore referred to as the Standard Bread Loaf Law, for the various reasons assigned in this brief.

Second. Appellants challenge as void any rules issued under a statute which is unconstitutional.

Third. In addition to challenging the statute as unconstitutional and the rules as issued under an unconstitutional statute, appellants challenge the rules and regulations issued by the Deputy Secretary of Agriculture under and pursuant to the authorization of the statute as unconstitutional on the grounds assigned herein. This is based on the fact that this Court has held in the cases of *J. P. King Mfg. Co.* v. *City Council of Augusta,* 277 U. S. 100, and *Sultan Ry. & Timber Co.* v. *Department of Labor and Industries,* 277 U. S. 135, and cases cited therein, that rules and regulations issued pursuant to legislative authority are in essence legislative acts of the State. This Court has held that such rules express the legislative will and have no force otherwise; and that, as respects their validity under the Constitution of the United States, such regulations are on the same plane as the statute in that they contravene the restraints which the Constitution places on the legislative power of the State, and are invalid.

To construe them otherwise would be to allow the legislature to authorize a board or bureau to do that which it cannot do itself.

As Mr. Justice Holmes says in *Pennsylvania Ry. Co.* v. *Public Service Commission*, 250 U. S. 566:

> "But whatever powers the state may deny to its commissions it cannot give them power to do what the laws of the United States forbid, whether they call their acts administrative or judicial."

To follow any other rule would destroy the safeguards which the Constitution throws around the citizens.

In order to have held as it did, the Supreme Court of Nebraska must have found: (1) The statute constitutional; (2) the delegation of authority to make rules constitutional; (3) that the rules as made were not statutes and could not be attacked until a request was made to the body issuing the rules to modify the rules.

Appellants do not understand the Red "C" Oil Mfg. Co. case or any other case to hold that appellants are bound to seek modification of rules based upon an unconstitutional statute, or upon a statute which on its face requires the adoption of rules which contravene constitutional provisions, nor do they understand that case to require that appellants are bound to seek the modification of unconstitutional rules before they can bring suit.

The undisputed evidence shows that the term "fancy breads" is an uncertain term. The statute fails to define the term "fancy breads", nor does the statute authorize the Secretary of Agriculture or anyone else to define "fancy breads". In the rules issued by the Deputy Secretary of Agriculture on June 24, 1931, he provides: "11. Fancy breads as defined by the Secretary of Agriculture of the State of Nebraska shall not be considered as coming within the scope of the law" (R. 26). Nowhere in the statute, in the rules issued June 24, 1931, nor in any other rules, is the term "fancy breads" defined.

The provision of the statute, which subjects the appel-

lants to change at the will of the Secretary of Agriculture, is an arbitrary and unreasonable restriction upon appellants' right to do business.

No restriction or limitation is placed upon the power of the Secretary of Agriculture in fixing the length of time during which weights must be maintained, and no restriction or limitation is placed upon his power in limiting excess tolerances, except that the statute provides that he shall fix "reasonable" tolerances above but not below the standard weights. The term "reasonable" is in itself indefinite and uncertain. The Secretary of Agriculture is not of necessity a baker. What he may consider reasonable may in fact be unreasonable and destructive. As was observed by this Court—

> "In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. *United States* v. *L. Cohen Grocery*, 255 U. S. 81, 89, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; *Small Co.* v. *Am. Sugar Ref. Co.*, 267 U. S. 233, 239, 45 S. Ct. 295, 69 L. Ed. 589; *Connally* v. *General Construction Co., supra; Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 454, 47 S. Ct. 681, 71 L. Ed. 1146; *Smith* v. *Cahoon*, 283 U. S. 553, 564, 51 S. Ct. 582, 75 L. Ed. 1264."
>
> *Champlin Refining Co.* v. *Corporation Commission of State of Oklahoma et al.*
> *Corporation Commission of State of Oklahoma et al. v. Champlin Refining Co.*, 286 U. S. 243.

If leaving to a jury the determination of reasonableness is unconstitutional, how much more so to leave this determination to one man, the Secretary of Agriculture, *whose*

determination does not require the submission of evidence and whose opinion may be changed from day to day.

POINT 3.

The provisions of the statute, and the rules and regulations with respect to the (a) time, (b) place, (c) possession and (d) particular loaves of bread required to comply with the statute, the violation of any one of which provisions would, under the statute, subject the appellants to a fine, irrespective of negligence, is a violation of the due process and equal protection clauses of the Fourteenth Amendment.

(*a*) The statutory provision relating to the time of weighing the bread is in the following language:

> "Sec. 3. The Secretary of Agriculture shall prescribe reasonable tolerances or variations in excess, but not under *the weights mentioned in the preceding section,* within which all loaves shall be baked, and also the *time for which said weights shall be maintained.*" (Italics ours.)

In the rules adopted June 24, 1931, the Deputy Secretary of Agriculture provided:

> "Tolerances shall apply for a period of 12 hours after baking" (R. 27).

The provision of Section 3 of the Act of the Legislature authorized the Secretary of Agriculture to provide the time for which said weights shall be maintained. This refers to "weights mentioned in the preceding section". This in turn refers to Section 2 of the Act providing for standard *minimum* weights.

The rule just quoted is of broader import than contemplated by the statute itself. The Legislature, by an express delegation of its legislative power, attempted to give the Secretary of Agriculture authority to fix any time

which he might desire during which period of time the minimum weight of the various standard loaves must be maintained, but it did not grant authority to limit the time during which overweight loaves might be prohibited.

This statutory limitation was recognized by the Deputy Secretary of Agriculture when in his rules of September 19, 1931, he abandoned the rule above referred to and adopted a new rule which provided that "Bread for sale in Nebraska shall be so made and baked that it will maintain after cooling its required *minimum* weight for not less than twelve hours under normal conditions" (R. 29).

No reason exists why the baker should be required to maintain loaf weights after completion of the baking process or after the packaging of the loaf is completed by wrapping. Manufacturers of other food products show the weight of the product when packed, but the baker is to be required by this statute and these rules to continue to be responsible for his loaf weights for a continued period of time thereafter. The duration of this period of time is left to the Secretary of Agriculture for determination and no limitation whatever is placed on his decision. The legislative intent, however, is clear that he must require the baker to maintain his weights for some lengthened period of time.

The undisputed evidence, which is further discussed under Point 4, shows that no matter how long or how short this extended period of time may be, the operation of natural laws over which the baker has no control produces continual changes and variations in loaf weights. These changes and variations will be large or small as weather conditions change, since on days of high temperature and low humidity the bread shows a greater evaporation loss than on days of low temperature and high humidity.

The rules of June 24, 1931, required the baker to maintain his loaf weights for twelve hours after baking, but the rules

of September 19, 1931, required maintenance of minimum weights for twelve hours atfer cooling. Since the bread must cool for about two hours after coming from the oven before it is suitable to wrap (R. 282), this means that the baker must maintain his loaf weights for about fourteen hours after baking if the wrapped loaf is construed as a cool loaf. During no part of this time is the baker able to do anything to add to or detract from the loaf weights. He is not even able to forecast how much change there may be in his loaf weights during this period of time.

The undisputed evidence shows (R. 86, 101, 279) that the last opportunity which the baker has to make his loaf conform to weight regulations is when the dough passes thru the scaling or dividing machine. At this place the baker scales such an amount of dough as he estimates, after allowing for later losses and gains, will produce a loaf weighing for example one pound when coming from the oven.

This scaling process itself produces some loaf weight variations owing to the presence of fermentation gases in the dough (R. 279). After the scaling the dough piece is sprinkled with dusting flour to prevent sticking (R. 280, 296) which dusting flour is added to and incorporated in the loaf, and results in slight variations between different dough pieces. This is followed by the rounding process (R. 280) where further dusting flour and dough pinching results in further variations. Next comes the proofing process (R. 280) where evaporation losses occur, and which is followed by the moulding process (R. 281) where dusting flour is again added. The placing of the dough pieces in pans follows next (R. 281) and here the pan grease, necessary to prevent sticking, is added to and incorporated in the loaf in varying amounts. Thereafter the baking process follows where the dough pieces are subjected to the high temperature of the bake oven with consequent evaporation loss in greatly varying amount (R. 281).

Throughout the processes above outlined these variations are beyond the control of the baker and result in loaves of bread which, though scaled the same at the dividing machine, will vary an ounce or more in weight when coming from the oven.

In addition to the foregoing variations the statute and the rules of the Deputy Secretary of Agriculture would subject the baker to further losses and variations for twelve or fourteen hours thereafter.

The provision of the statute requiring the loaf to conform to a specified minimum weight when baked makes it necessary for the baker to over-scale his dough to insure that the loaf will weigh the minimum weight or more. These rules, requiring that the loaf must continue to maintain its required minimum weight for a further period of twelve or fourteen hours after baking, makes still greater overscaling necessary, with the consequent danger that many of the loaves will be overweight when baked, and will thus violate the excess tolerance provision. During no part of this time can the baker by any known process do anything to add to or detract from the weight of his loaf as he estimated it would be when the dough passed through the scaling machine.

During the twelve or fourteen hours after completion of the baking process weight variations through evaporation are constantly occurring. These variations often exceed two ounces per pound loaf but cannot be estimated in advance. To these variations must be added the baking variations, often exceeding one ounce, so that the bakers loaf will often be more than three ounces different in weight, twelve or fourteen hours after baking, than the baker estimated it would be when he scaled the dough.

On the identical evidence in this case this Court in the Burns case, *supra*, held:

"The parties introduced much evidence on the question whether it is possible for bakers to comply with the law. A number of things contribute to produce unavoidable variations in the weight of loaves at the time of and after baking. The water content of wheat, of flour, of dough, and of bread immediately after baking, varies substantially and is beyond the control of bakers. Gluten is an important element in flour, and flour rich in gluten requires the addition of more water in breadmaking, and makes better bread, than does flour of low or inferior gluten content. Exact weights and measurements used in doughmaking cannot be attained. Losses in weight while dough is being mixed, during fermentation, and while the bread is in the oven, vary, and cannot be avoided or completely controlled. No hard and fast rule or formula is followed in breadmaking. There are many variable elements. Bread made from good flour loses more weight by evaporation of moisture after baking than does bread made from inferior flours. Defendants' tests were made principally with loaves which were wrapped so as to retard evaporation; and it was shown that by such wrapping the prohibited variations in weight may be avoided. On the other hand, the evidence clearly establishes that there are periods when evaporation under ordinary conditions of temperature and humidity prevailing in Nebraska exceed the prescribed tolerance, and make it impossible to comply with the law without wrapping the loaves or employing other artificial means to prevent or retard evaporation. And the evidence indicates that these periods are of such frequency and duration that the enforcement of the penalties prescribed for violations would be an intolerable burden upon bakers of bread for sale."

The rules of September 19, 1931, provide that *minimum* weights must be maintained for twelve hours after cooling. This rule has no application to the excess or maximum tolerances, so that an overweight loaf is a violation of the law no matter how old it may be.

In view of the evidence and the decision of this Court in the Burns case the appellants respectfully contend that the provision which subjects the baker to a fine, not on account of any negligence on his part, but because by the operation of natural laws his lawful loaf may fall below the minimum weight within twelve or fourteen hours after baking, or may exceed the maximum at any time, is an unreasonable restriction upon his right to do business.

(*b*) and (*c*) The statute makes no provision as to where the weighing of the bread must take place. The rules of June 24, 1931, contained no provision as to where the weighing must take place, so that under both the statute and the first rules the bread may be weighed wherever found.

The United States District Court of Nebraska held:

> "The portion of the statute exposing the baker or seller of bread to liability for the payment of a fine, not because of any acts or negligence on his part, but because of the manner in which bread may be kept by the retailer to whom it has been sold, is an essentially arbitrary and unreasonable restriction upon his right to transact business, and is invalid under the provisions of the Fourteenth Amendment to the Constitution of the United States."
>
> *P. F. Petersen Baking Co.* v. *Weaver, supra.*

This fact being one of the sources of appellants' complaint against the law, the Deputy Secretary of Agriculture attempted to remedy this condition in his rules of September 19, 1931. These rules were adopted while this suit was pending, while the restraining order was in effect, while the defendants were in default having failed to answer in time, and without any authority under the statute. These rules stated that the baker "shall not be responsible for the maintenance of the *minimum* weight after delivering the same to a retail dealer or consumer, or to a transportation agency in Nebraska, for delivery to a retail dealer or consumer".

It will be observed that this new rule has no application to excess tolerances, so that the baker is still subject to criminal prosecution for overweight bread regardless of where it may be found and regardless of its age.

Appellants contend that the Supreme Court of Nebraska erred in giving any consideration to rules adopted subsequent to the commencement of this suit and during the time the defendants were restrained from enforcing the provisions of the statute, but disregarding the propriety and evidential value of rules adopted under such conditions, the appellants further contend that the particular rule above referred to is of no force since no statutory authority existed for its adoption by a ministerial officer such as the Deputy Secretary of Agriculture.

> "No authority to repeal, extend, or modify a statute is to be implied from the delegation of authority to enforce it."
>
> *U. S.* v. *11,150 Lbs. Butter,* 195 Fed. 657.

No authority having been granted by statute for the Secretary of Agriculture to modify the statute as to the place of weighing the bread, his rule is of no force in so far as it attempts to limit the place of weighing.

Neither the statute nor the rules require the weighing to take place while the bread is in the possession of the baker, as did the 1921 law considered in the Burns case. The rule of law stated in the case of *P. F. Petersen Baking Co.* v. *Weaver, supra,* applies in this instance.

(*d*) There is no statutory provision as to the number of loaves which shall be weighed to determine whether the baker is a law violator. Under the statute any individual loaf which is over or short of the prescribed weights subjects the baker to the penalties of the statute. The Deputy Secretary of Agriculture, without authority, attempts to

limit the statute by his rules in which he provides that weights shall be determined by averaging the weight of five loaves "if available" (R. 27 and R. 29).

The 1921 law considered in the Burns case provided that weights should be taken on the *premises where the bread was manufactured* and should be determined by averaging not less than twenty-five loaves. In passing on that statute in the Burns case, *supra,* this Court said:

> "Any loaves of the same unit at any time on hand during 24 hours after baking may be selected to make up the 25 loaves or more to be weighed, in order to test compliance with the act. Therefore, if only a small percentage of the daily output of the loaves in large bakeries shall exceed the maximum when taken from the oven, or fall below the minimum weight within 24 hours, it will always be possible to make up lots of 25 or more loaves whose average weight will be above or below the prescribed limits."

Under the present statute and rules if only *five* loaves of the total daily output in large bakeries shall exceed the *maximum at any time, regardless of age,* or shall fall below the minimum weight at any time within twelve or fourteen hours, it will always be possible to make up lots of five loaves which will subject the baker to the penalties of the statute.

With the thousands of loaves manufactured daily by each of the appellants, the Secretary of Agriculture will attempt to determine whether the baker is a law violator by averaging the weight of only five loaves, or even a lesser number, if five loaves are not "available". These loaves are not even required to be picked at random but may be selected by the inspector with an eye to obtaining either overweight or underweight loaves.

The arbitrary and unreasonable character of the statute and the rule is even more far-reaching than appears on its

face. Unwrapped bread is in great demand as shown by the evidence. This bread does not bear a weight label. If, therefore, the baker, in trying to produce twenty-four ounce loaves, actually produces five loaves which drop in weight below twenty-four ounces at any time regardless of age, the inspectors may consider these as overweight pound loaves as suggested by the Supreme Court of Nebraska and may arrest the baker thereof.

The provisions of the statute, and the rules and regulations permitting the weighing of the bread at any time within twelve or fourteen hours after baking to determine short weights, and at any time whatever as to overweight loaves, wherever the same may be found, and regardless of the possession of the loaves at the time weighed, basing the determination of the bakers' guilt or innocence upon the average weight of only five loaves "if available", is an arbitrary and unreasonable restriction upon the rights of the appellants herein.

POINT 4.

The provisions of the statute, rules, and regulations fixing tolerances which are impossible of performance and which require maintenance of the loaves of bread within this tolerance for an unreasonable length of time, are a violation of the due process and equal protection clauses of the Fourteenth Amendment.

The rules in effect when this suit was instituted provided for an excess tolerance of two ounces per pound loaf and further provided that the tolerance should apply for twelve hours after baking. Under this rule the one-pound loaf must continue to weigh between sixteen and eighteen ounces for twelve hours after the baking process was completed.

This two-ounce per pound excess tolerance is the same as the tolerance considered by this Court in the Burns case, *supra,* and which was there held to be arbitrary, unreasonable and void.

After the appellants had brought this action and had obtained a temporary restraining order restraining the appellees and each of them, their agents and employees from enforcing or attempting to enforce the statute or rules pending hearing of the suit, and after the appellees were in default of answer in this suit, the Deputy Secretary of Agriculture on September 19, 1931, adopted a new rule which provided for a three-ounce per pound excess tolerance and which further provided that *minimum* weights must be maintained for a period of twelve hours *after cooling* (a variable element, but more than fourteen hours after baking under any circumstance).

The Court's particular attention is called to the fact that this latter rule requires maintenance of *minimum* weights for the extended period of time, after which it is presumed that short-weight loaves might be sold as stale bread or in some manner disposed of to prevent economic loss, but that overweight loaves would subject the baker to the penalties fixed by the statute, no matter how old the loaves might be.

Appellants do not contend that it is at all times and under all conditions impossible to comply with the tolerance requirements as to a majority of the loaves baked, but they do contend that on many loaves which they bake they cannot comply with the tolerance. They further contend that there are many times and seasons of the year in Nebraska when it is impossible to comply with either a two or a three-ounce tolerance for a period of twelve hours after the baking process is completed on a large percentage of the loaves baked.

Much testimony was offered showing actual tests made with the regular quality of bread produced by the appellants and these actual tests reveal many instances where the variations exceed three ounces. These tests, with baking variations, evaporation losses during twelve hours after baking, and total variations, are as follows:

Record page.	Baking variations.	Evaporation losses.	Total variations.
R. 113	1 ounce	1¾ ounces	2¾ ounces
R. 114	1 ounce	2 ounces	3 ounces
R. 115	1 ounce	2 ounces	3 ounces
R. 116	2¾ ounces	Not shown	Not shown
R. 310	1 ounce	2¼ ounces	3¼ ounces
R. 311	2 ounces	2¼ ounces	4¼ ounces
R. 312	1½ ounces	3½ ounces	5 ounces
R. 312	1 ounce	2½ ounces	3½ ounces

In many of these tests appellants showed the actual temperature and humidity existing where the bread was kept, and several of the later tests, notably those at R. 310, show some loaves kept in a cool room of high humidity, with no circulation of air, other loaves kept in a room of moderate temperature and humidity, and other loaves kept in a room of high temperature and low humidity. These were designed to show the Court how different temperatures and humidities will effect the evaporation of moisture from bread, without in any way changing its food value. The temperatures and humidities shown are less severe than those actually existing in Nebraska at certain seasons of the years, as is revealed by the United States Weather Bureau charts shown at R. 314a, 314b, 314c, 314d.

The foregoing tests reveal baking variations in excess of one ounce, and evaporation losses in excess of two ounces, with total variations exceeding three ounces, so that whether the rules of June 24, 1931, fixing two-ounce tolerances, or the rules of September 19, 1931, fixing three-

ounce tolerances are considered, the evidence reveals that they are frequently inadequate.

Appellants believe that the arguments made under Point 1 are decisive in that such excess tolerance provisions serve no useful purpose, do not protect the customer against short weights, and are not calculated to effectuate that purpose, but that they place the baking industry under restrictions which are impossible of compliance. It is not only possible but desirable that the baker comply with a minimum weight regulation, but in doing so he should be given opportunity to so scale his dough that all the baked loaves will attain or exceed the minimum weight without having at least a part of his loaves exceed an arbitrary maximum weight.

The Supreme Court of Nebraska made a finding in the Burns case, that excess tolerances were necessary. When this Court heard that case on writ of error it was decided that such excess tolerances were not only unnecessary, but were arbitrary and unreasonable as well. In this case, however, the Supreme Court of Nebraska again asserts the same doctrine that it held in the Burns case, that excess tolerances are necessary.

This finding of the Supreme Court of Nebraska is not supported by the evidence presented by the appellees themselves. Some of their tests reveal variations and losses in excess of even the three-ounce tolerance. The test at R. 258 shows baking variations of three and five-eighths ounces and evaporation losses of three-eighths ounce, a total of four ounces, while the test at R. 265 also shows baking variation and evaporation losses totaling four ounces. It is also to be observed that in the appellees' tests the temperature and humidity of the place where the bread was kept is not shown, and without such a showing it is impossible for the court to know whether the condi-

tion of that place in any way compares with actual weather conditions in Nebraska.

It is further to be noted that the tests presented by the appellees with few exceptions do not show the variations occurring during the baking process and which average in excess of one ounce, nor do these tests show evaporation losses occurring immediately after the baking and before the first weighing. Most of the appellees' tests were made with bread purhased on the open market, and the testimony shows (R. 282) that the average loaf of bread sold by commercial bakers is about twelve hours' old when it first reaches the market. Most of appellees tests, therefore, fail to show the baking variations or the evaporation losses for the first twelve hours after baking, but show the evaporation losses for the second twelve-hour period. It is during the first few hours after baking that the more rapid evaporation takes place.

The act itself does not fix the time for which it is necessary to maintain the loaves within this tolerance, but the Deputy Secretary of Agriculture in his first rules provided that loaves must be kept within the tolerance weight for twelve hours after baking, and by his second rules provided that ~~maximum~~ minimum weights must be maintained for twelve hours after cooling, but permitted arrest for overweight bread regardless of its age. The 1927 Nebraska law, the 1921 Ohio law, the 1927 Alabama law and the 1927 Iowa law all provided that tolerances should apply for twelve hours after baking and all were held unconstitutional as set forth under Point 1.

In view of the actual tests which reveal that it is impossible at all times to comply with either a two or a three-ounce tolerance and to hold bread within this tolerance bracket for a period of twelve or fourteen hours after baking, and in view of the further fact that overweight bread

may be weighed at any time, regardless of age, to show violation of the excess tolerance, appellants submit that this is an unreasonable restriction upon their right to do business and a violation of the due process and equal protection clauses of the Fourteenth Amendment.

POINT 5.

The provisions of the statute, and the rules and regulations referring to "fancy breads", which describes no known commodity; the provisions of the statute prohibiting the manufacture (not the sale) of loaves of bread differing from the standard weight, and the failure of the statute and the rules and regulations to define the crime of manufacturing overweight bread, all in conjunction with the statute, a penal statute creating a new offense, are not sufficiently explicit to inform appellants what condition would make them liable to penalties of the statute, and the statute and the rules and regulations are so vague that men of common intelligence must of necessity guess at their meaning, which is a violation of the due process and equal protection clauses of the Fourteenth Amendment.

The statute (*a*) fails to define "fancy breads", (*b*) fails to define a reasonable tolerance which is to be fixed by the Secretary of Agriculture, (*c*) fails to define the crime of manufacturing overweight bread, (*d*) fails to provide the time for which tolerances shall apply, (*e*) fails to fix the place of weighing, (*f*) fails to fix the number of loaves which must be weighed, and (*g*) fails to indicate the meaning of "if available". Examination of the statute reveals that the legislature has fixed certain standard loaves of bread, has prohibited other weight loaves and has provided that "fancy breads" shall not be subject to the weight provisions. This with the penalty section is the sum total of

the legislative enactment, except that in an attempt to circumvent the decisions of this and other Courts, a delegation of legislative authority was made to the Secretary of Agriculture to provide (1) reasonable excess tolerances and (2) the time for which the weights shall be maintained.

(*a*) The statute provides that it shall not apply to "fancy breads" but fails to define "fancy breads". The evidence shows that this is an indefinite term (R. 285, 294, 300, 302, 304, 306, 307, 308) describing no known commodity is not a trade name in the baking industry and has never been defined by the courts nor by baking practice. The dictionary (Fung & Wagnalls) defines "fancy" as "of higher grade than the average, superior in quality, choice" and applying this definition to the term here used "fancy breads" are breads of higher grade than the average, superior in quality, choice. The first question for determination, therefore, in arriving at a decison whether a particular bakers' product comes within the provisions of the statute is, what is the average grade or quality of bread and is this particular bread superior to the average?

The statute confers no authority on the Secretary of Agriculture to define "fancy breads" and he has not attempted to define the term, and it therefore, becomes subject to interpretation and definition by the jury hearing a case involving violation of the act. What one jury might find to be "fancy breads" and therefore not within subject of the statute, another jury might find is not "fancy breads." This is not the definiteness and certainty required of criminal statutes.

(*b*) The statute confers power on the Secretary of Agriculture to prescribe "reasonable" tolerances in excess, but not under the standard weights, but gives no yard stick with

which to measure reasonableness. On June 24, 1931, the Deputy Secretary of Agriculture seemed to consider a two-ounce per pound tolerance as reasonable, and on September 19, 1931, he considered three ounces per pound as reasonable. Certainly in any arrests under the statute, whether brought upon the rules of June 24, 1931 or the rules of September 19, 1931, a vulnerable point of attack for the defense is the reasonableness of the tolerances, and what might be considered by one court as reasonable might be considered unreasonable by another. This is not the certainty and definiteness required of criminal statutes as held by this Court in *Champlin Refining Co.* v. *Corporation Commission, Supra.* In passing upon a similarly indefinite statute the Supreme Court of Kentucky said in *L. & N. Railway Co.* v. *Commonwealth of Kentucky,* 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457,

> "That this statute leaves uncertain what shall be deemed a just and reasonable rate of toll or compensation cannot be denied, and that different juries might reach different conclusions, on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements. * * * A statute imposing a penalty for charging more than just and reasonable compensation for the services of a carrier, without fixing any standard to determine what is just and reasonable, thus leaving the criminality of the carrier's act to depend upon the jury's view of the reasonableness of a rate charged, is in violation of the constitutional provision against taking property without due process of law."

(*c*) The statute fails to define the crime of manufacturing overweight bread. The first essential element of this

crime is dependant upon the tolerance to be fixed by the Secretary of Agriculture. It takes legislative action on the part of the Secretary of Agriculture to create the offense. On September 18, 1931, a loaf weighing 18½ ounces was an unlawful loaf and would render the baker liable to the penalties of the statute, but on the following day, September 19, 1931, thru the legislative action of the Secretary of Agriculture, this same loaf became a lawful loaf. On that day in order to be an unlawful loaf it must weigh over 19 ounces. The uncertainty as to what tolerance weight the Secretary of Agriculture might fix from day to day is not the definiteness required of criminal statutes.

> "A crime can be created only by a public act, and the language of the act must be sufficient to declare and define the crime and affix the punishment. * * * It is not competent for Congress to entrust to the executive the power to declare by a departmental rule or regulation that to be unlawful, in the sense of criminal, which would otherwise be lawful; nor, itself, to declare a violation of rules or regulations thereafter to be promulgated by the executive, a criminal offense. The crime must be created by the act of Congress, alone, for the public are NOT REQUIRED TO LOOK BEYOND THE ACT in their endeavor to ascertain what is criminal, and the discretion of fixing what facts import criminality is exclusively that of the law maker as distinguished from the executive. The effect of departmental regulations, not ratified by act of Congress, is confined to civil matters, and cannot be made the predicate of criminal offenses."
>
> *U. S.* v. *L. & N. Railway Co.*, 176 Fed. 942.

The statute applies to "every loaf of bread made for sale in the State of Nebraska." Appellants are engaged in the manufacture of bread in Nebraska, and in other States, the sale of bread manufactured in other States in Nebraska,

and sale in other States of bread manufactured in Nebraska.

Since no punctuation marks appear in the statutory provision the question arises whether the statute applies: (1) To every loaf of bread manufactured in Nebraska, whether sold in Nebraska or elsewhere; or (2) To every loaf of bread manufactured in Nebraska for sale only in Nebraska, or (3) Every loaf of bread no matter where manufactured but for sale in Nebraska.

Aside from this, however, the statute makes the *manufacturing* of overweight or shortweight bread a crime. The sale of this bread is not an offense. When the baker manufactures a loaf of bread he does so for the purpose of sale. If however, he discovers some of his loaves to be overweight or shortweight, he is liable to the penalties of the statute even though he never sells or offers these loaves for sale, and regardless of whether he intended to so sell them after he discovered them to be over or short weight.

(*d*) The statute fails to fix the time for which tolerances shall apply. It does, however, provide that the Secretary of Agriculture shall prescribe "the time for which said weights shall be maintained". As observed under Point 3, the Deputy Secretary of Agriculture on June 24, 1931 provided that "tolerances shall apply for a period of twelve hours after baking". This rule was not within the power conferred by the statute since it also placed a twelve hour limitation upon prosecutions for overweight bread so on September 19, 1931, the Deputy Secretary of Agriculture adopted a new rule which provided that bread should be so baked that " it will maintain *after cooling* its required *minimum* weight for not less than twelve hours *under normal conditions.*" (Italics ours.)

It will be observed that the statute itself is indefinite and uncertain in that no limitation whatever is placed upon the

Secretary of Agriculture in fixing these times. So far as the statute is concerned there is no requirement that this period of time be even reasonable, and the bakers contend that any requirement which holds them liable for weight losses after completion of the baking is unreasonable.

If the rules of June 24, 1931 are to be considered, the provision as to time exceeds the authority delegated by the statute, but if the rules of September 19, 1931, are to be considered they lack the definiteness and certainty required of criminal statutes. By these rules minimum weights must be maintained for twelve hours *after cooling*. This raises the question of how cool a loaf of bread must be before the twelve-hour period commences to run. The Court is entitled to take judicial notice of what is common knowledge, that a heated object takes longer to cool on hot days than on cool days. If the Secretary of Agriculture's rule, when it speaks of "after cooling", refers to the time of wrapping it should say so. And, if this is the meaning, what of the bread sold as unwrapped bread and which is in great demand? (*Burns* case.)

Under these rules the minimum weights must be maintained for twelve hours after cooling *under normal conditions*. No indication is given as to what is meant by normal conditions. If this refers to weather conditions, is the determination of "normalcy" to be based upon the annual, seasonal, monthly or weekly mean temperature? If it refers to conditions of humidity, are normal conditions those existing during dry weather or rainy weather? What one jury might regard as normal conditions another jury on the same evidence might find to be not normal.

In the foregoing particulars both the statute and the rules and regulations are lacking in the definiteness and certainty required of criminal statutes.

(*e*) The statute does not contain any provision as to the place of weighing the bread. The 1921 law considered by this Court in *Burns* case, *supra,* provided that the weighing must take place "on the premises where the bread was manufactured." This statute, however, permits the weighing to take place wherever the bread is found. Neither does the statute extend authority to the Secretary of Agriculture to adopt any rules limiting the place of weighing.

(*f*) The statute is further indefinite and uncertain in that no provision is made as to the number of loaves to be weighed to determine whethere the baker is a law violator. By both sets of rules adopted by the Deputy Secretary of Agriculture it is provided that weights shall be determined by averaging the weight of not less than five loaves of a given unit "if available". No statutory authority exists for this rule and so far as the statute itself is concerned a single overweight or underweight loaf subjects the baker to its penalties.

(*g*) Under both sets of rules as issued by the Deputy Secretary of Agriculture, weights are to be determined by averaging the weight of not less than five loaves of a given size "if available".

The word "available" is defined in 6 C. J., page 871, as follows:

> "Usable; capable of being used to advantage; having sufficient force or efficacy for the object; effectual."

In other words, under the rules of the Deputy Secretary of Agriculture, the application of any of the above meanings to the word "available", leaves the matter entirely within his discretion and his determination, or the determination of his inspector, whether or not the loaves are available, and provides no fixed rule for the baker so that he can avoid criminal prosecution under the Act.

In view of the foregoing deficiencies, the appellants do not know what bread will be subject to the weight provisions or what bread will be regarded as "fancy breads". They do not know what the Deputy Secretary of Agriculture may regard as a reasonable excess tolerance. They do not know how long a time they are required to maintain minimum weights, or when the twelve-hour period "after cooling" commences to run. They do not know what constitutes the "normal conditions" under which they are required to maintain their loaf weights. They do not know where their loaves will be weighed nor how many loaves are to be weighed to determine whether or not they have committed a crime.

The statute, being deficient in these particulars which are essential elements of the crime created thereby, is within the rule stated by this Court as follows:

> "The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. * * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning

that the citizen may act upon the one conception of its requirements and the courts upon another."

Connally v. *General Construction Company*, 269 U. S. 385.

This rule is further stated in a more recent case as follows:

"Either the statute imposed upon the appellant obligations to which the state had no constitutional authority to subject him, or it failed to define such obligations as the state had the right to impose with the fair degree of certainty which is required of criminal statutes. Considered as severable, the statute prescribed for private carriers 'no standard of conduct that it is possible to know.' *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; *Collins* v. *Kentucky*, 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; *Weeds, Inc.*, v. *United States*, 255 U. S. 109, 41 S. Ct. 306, 65 L. Ed. 537; *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322. * * * The Legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord."

Smith v. *Cahoon*, 283 U. S. 553.

POINT 6.

The statute, and the rules and regulations thereunder, prohibiting a twenty-ounce loaf of bread is not a valid exercise of the police power of the State, but is an arbitrary and unreasonable restriction upon appellants' right to do business and a violation of the due process and equal protection clauses of the Fourteenth Amendment.

The undisputed evidence shows that the largest selling loaf of bread not only in Nebraska (R. 294, 297, 299, 303,

304, 309) but throughout the entire United States (R. 122) is one weighing approximately twenty ounces when baked. The bakers of Nebraska are prohibited by this statute from furnishing a loaf of this size to their customers.

The undisputed evidence further shows that this twenty-ounce loaf of bread is manufactured of the same ingredients as loaves of other weights (R. 286, 294, 297, 305), is a wholesome article of diet (R. 286, 294, 297, 305), contains equal food value in proportion to its weight as is contained in loaves of other weights (R. 286, 297, 305) and that no reason exists for its prohibition.

That the Supreme Court of Nebraska recognized the demand for this particular loaf is indicated in its opinion in this case, when it said:

> "Bakers may make as a pound loaf, one perfectly legal, but weighing 19 ounces and sell it as a substitute for the present twenty-ounce loaf which some of the plaintiffs greatly favor. It may or may not deceive the consumer accustomed to a twenty-ounce loaf. Whether it deceive him or not, no action will lie because the loaf is within the tolerance provided by the act."

Aside from the bad business ethics involved if the bakers were to practice deceit upon their customers in the manner suggested by the foregoing quotation, the Supreme Court of Nebraska overlooked the fact that owing to baking variations and evaporation losses it is impossible for the bakers to produce loaves weighing nineteen ounces without having many loaves which will exceed the nineteen ounces and thereby violate the statute. In fact if the defendants' own tests are to be believed (R. 258) and baking variations of three and five-eighths ounces are to be expected, in his attempt to manufacture nineteen-ounce loaves the baker will have some loaves which may fall as low as fifteen and three-

eighths ounces. If this were to occur such a loaf designed to be the very top of the permissible weight bracket would in fact be below the minimum weight fixed by the statute at the very time it comes from the oven.

The defendants' own testimony discloses the futility of any attempt to supply the demand for the twenty-ounce loaf by manufacturing and selling a nineteen-ounce loaf as a substitute.

That the State, in the exercise of its police powers, may protect the public health, safety and welfare is elementary. It is equally fundamental that a

> "police measure must fairly tend to accomplish the purpose of its enactment, and must not bo beyond the reasonable demands of the occasion."
>
> Cooley's Constitutional Limitations (8th Edition) 1231.

If the purpose of bread weight legislation is to protect the public from short weights, it is difficult to see how this may be accomplished by prohibiting the manufacture of the particular loaf in greatest demand with the consumer.

> "When the police power is exerted to regulate the conduct of a useful business or occupation, the legislature is not the sole judge of what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling and exercise his own judgment as to the manner of conducting it, but the measures adopted to protect the public health and secure the public safety and welfare must have some relation to these proposed ends."
>
> *Banghart* v. *Walsh,* 339 Ill. 132.

Appellants contend that they have a constitutional right to make a twenty-ounce loaf of bread to label it as a twenty-ounce loaf, and to sell and charge for it as such, rather than to practice deceit upon their customers by making them be-

lieve they are receiving a twenty-ounce loaf but which in fact weighs nineteen ounces or less.

By analogy the situation as to the twenty-ounce loaf may be compared with the finding of this Court in the *Burns* case with reference to unwrapped bread, in which this Court said:

> "The uncontradicted evidence shows that there is a strong demand by consumers for unwrapped bread. It is a wholesome article of food, and plaintiffs in error and other bakers have a right to furnish it to their customers."

There is also a strong demand by consumers for the twenty-ounce loaf. It also is a wholesome article of food, and appellants believe they have a constitutional right to furnish it to their customers.

POINT 7.

That the Supreme Court of Nebraska erred in finding and holding that the appellants were not entitled to the injunction prayed for in their petition under the provisions of the due process and equal protection clauses of the Fourteenth Amendment.

In the argument upon the preceding six points the appellants have shown that the Nebraska Standard Bread Loaf law and the rules and regulations adopted thereunder violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in the following particulars:

(*a*) Maximum tolerances over fixed weights for loaves of bread serve no useful purpose, are not necessary for the protection of purchasers against imposition and fraud, and are not calculated to effectuate that purpose, but subject

bakers and sellers of bread to restrictions which are unreasonable and arbitrary.

(*b*) The grant of unlimited power to a ministerial officer such as the Secretary of Agriculture by which he is empowered to prescribe excess tolerances, the time for which loaf weights must be maintained, and to define "fancy breads" is an unreasonable and arbitrary restriction upon appellants' right to do business.

(*c*) The provisions of the statute and of the rules and regulations relating to the time, place, possession and particular loaves required to comply with the statute is a violation of the constitutional guarantees of appellants, since a violation of any such provision, irrespective of negligence, would subject them to a fine.

(*d*) The statute and the rules and regulations arbitrarily fix excess tolerances which are impossible of performance, and require their maintenance for an unreasonable length of time.

(*e*) The statute and the rules and regulations, establishing a new criminal offense, are not sufficiently explicit to inform appellants what condition will make them liable to its penalties, and are so vague that men of common intelligence must of necessity guess at their meaning.

(*f*) The statute and the rules and regulations arbitrarily prohibit the manufacture and sale of a twenty-ounce loaf of bread, which is in great demand with the consuming public.

In view of the foregoing appellants respectfully submit that the statute and the rules and regulations are a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and that appellants are entitled to an injunction as prayed for in their petition.

VII.

Conclusion.

For the reasons hereinbefore set forth appellants respectfully urge that Chapter 162, Laws of Nebraska, 1931, and Special Session, 1931, commonly known as the Nebraska Standard Bread Loaf law, and the rules and regulations adopted thereunder on June 24, 1931, and September 19, 1931, are unconstitutional and void, and respectfully pray that the Court reverse the decision of the Supreme Court of Nebraska, and grant the injunction prayed for in the petition.

JOHN C. GROVER,
HAROLD D. LEMAR,
Counsel for Appellants.

APPENDIX "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

No. 261. Equity.

P. F. PETERSEN BAKING CO., *et al., Plaintiffs,*

vs.

ARTHUR WEAVER, *Governor, et al., Defendants.*

Memorandum Opinion.

Filed Dec. 30, 1929.

PER CURIAM:

This cause has been submitted on final hearing upon the pleadings and evidence, to a court of three judges, acting under the provisions of Section 266 of the Judicial Code.

The plaintiffs' bill seeks to enjoin the enforcement of an act of the Nebraska Legislature approved April 20, 1927 (1927 Session Laws, Nebr. 394). The act of the Legislature, omitting the title and repealing clause and the reference to prior statutes amended is as follows:

> "7613. Bread, Standards of Weight.—Every loaf of bread made or procured for the purpose of sale, sold or offered for sale in the State of Nebraska, shall be of the following weights avoirdupois:
>
> "One-half pound, one pound, one and one-half pounds, and also in exact multiples of one pound and of no other weights. Whenever twin or multiple loaves are baked, the weights herein specified shall apply to each unit of the twin or multiple loaf, provided that a twin one and one-half pound loaf may be made and sold, but units of said loaf must not be sold separately."
>
> "7614. Tolerance, how Determined.—Tolerance at the rate of one ounce per pound under on all individual

loaves shall be allowed and a tolerance at the rate of three and one-half ounces per pound in excess, but none in deficiency of the standard weights herein prescribed shall be allowed on the average weight of at least five loaves of the same nominal weight and of the same manufacturer, or on the average weight of all such loaves when the supply available, at the time and place of weighing exceeds five such loaves and is not more than ten loaves. If more than ten such loaves are available, at least ten shall be weighed in determining the average. Whenever the number of such loaves available exceeds the number of loaves so to be weighed, the loaves weighed shall be taken at random. Tolerances shall apply for a period of twelve hours after baking or delivery to retailer."

"7615. Violation, Penalty.—Any person, firm or corporation violating any of the provisions of this Act, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars."

In substance, the bill alleges that the plaintiffs are citizens of Nebraska or are corporations organized under the laws of Nebraska or of other States, and are engaged in the baking and distribution of bread in Nebraska. They allege that it is impossible to comply with the provisions of the statutes, particularly in keeping the bread baked or offered for sale by them within the maximum and minimum weights designated, because of the usual and necessary conditions surrounding the baking and distribution of bread in the State, and more especially because it is impossible to control the evaporation of the moisture content of the bread.

The bill charges that the enforcement of the statute would deprive the plaintiffs of their liberty and property in violation of the 14th Amendment to the Constitution of the United States. The bill alleges that more than $3,000.00, exclusive of interest and costs, is involved in the suit, and the answer puts this allegation in issue.

The object of the bill is to restrain the enforcement against each plaintiff of the act of the Legislature. The

value of each plaintiff's right to continue in business, unhampered by the statute, must be above $3,000.00 exclusive of interest and costs, to entitle him to relief in this Court. *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 85, 86; *Sovereign Camp* v. *O'Neill,* 266 U. S. 292, 295. The proofs fail to show that the requisite amount is involved in the cases of plaintiffs Schulze Baking Co., Rex Baking Co., Butter-Nut Bakery, Butter-Nut Bread Co., Andrew Geistlinger, Motts Wendlin, Henry L. Ebner, Oscar Kuenne, and Fred Hannegan, and as to each of them, the bill must be dismissed for want of jurisdiction.

The remaining plaintiffs assert that the statute in question must be held to be invalid for the same reasons that the prior statute of Nebraska was held to be invalid in *Jay Burns Baking Co. et al.* v. *Bryan,* 264 U. S. 504. The defendants contend that the evidence in this case shows that the greater allowances between maximum and minimum weights given by the Statute of 1927 are reasonable, and that it is practicable for bakers and dealers to comply with the statute.

The statute, as we interpret it, undertakes to penalize the making for sale, procuring for sale, the sale or offering for sale, in Nebraska, of bread loaves which are not within the tolerance weights, and requires that the prescribed weights shall be maintained "for twelve hours after baking, or delivery to retailer". The evidence establishes that bread loaves, although they may be of the prescribed maximum weight at the time of baking, may, and often will, shrink to below the prescribed minimum weight in periods of 24 to 72 hours, when kept in the ordinary manner, or in the course of shipment to customers, or as kept by the retailer, after having been sold to him. This loss of weight occurs because of the weather conditions, or because of the temperature and condition of the humidity in the baker's warehouse, or in the express cars or other vehicle of transportation, or in the retailer's place of business.

It is shown that it is customary for bakers and dealers to ship bread loaves to other points in the State, and that some of such shipments do not reach the consignee for

sixty hours. It is to be noted that the prior statute required that the average weight of the loaves should be not less than the minimum nor more than the maximum weight for twenty-four hours after baking, and that the weights were to be determined on the premises where the bread was manufactured or baked, or, if the bread was shipped into the State, the weight was to be determined when it was sold or exposed for sale. The statute now in question requires the average weight to be below the maximum and above the minimum weight for twelve hours after baking "or delivery to retailer". Under this statute, the baker or wholesaler may have kept his loaves of bread within the legal limits of weight at all times until he has sold and delivered the loaves to a retailer, and until his possession and right of control has terminated, and yet be subject to a penalty because the loaves shrink in weight within twelve hours after the retailer has taken possession of the bread.

The evidence shows that evaporation of moisture from the loaves may, and probably will, continue after the bread is in the retailer's hands. It may be exposed in show cases, or in open racks, to drying conditions caused by modes of heating the retailer's place of business, and it may shrink in weight from exposure to sunlight or currents of air, or from many other causes.

The danger of excessive shrinkage is greater when the bread has been shipped to dealers at some distance from the baker or wholesaler, and has already suffered some loss of weight before it reaches the retailer.

The portion of the statutes exposing the baker or seller of bread to liability for the payment of a fine, not because of any acts or negligence on his part, but because of the manner in which bread may be kept by the retailer to whom it has been sold, is an essentially arbitrary and unreasonable restriction upon his right to transact business, and is invalid under the provisions of the Fourteenth Amendment to the Constitution of the United States.

It is impossible to say that this portion of the statute is so separable from the remainder of the statute, that the Legislature would have enacted the statute if that portion had been omitted, and hence the statute cannot be main-

tained, shorn of this portion. *Allen* v. *Louisiana*, 103 U. S. 80, 84; *C., M. & St. P. Ry.* v. *Westby*, 178 Fed. 619, 629.

The conclusion which has been reached makes it unnecessary to consider other questions which have been presented in argument.

A decree will be entered enjoining the enforcement of the statute against the plaintiffs.

UNITED STATES OF AMERICA,
District of Nebraska,
Lincoln Division, ss:

I, R. C. Hoyt, Clerk of the District Court of the United States within and for the District aforesaid, do hereby certify that the foregoing is a true and correct copy of the original memorandum opinion filed on the 30th day of December, 1929, in the matter of P. F. Petersen Baking Co. *et al. versus* Arthur Weaver, Governor, *et al.*, No. 261, Equity, as the same appears of record in my office.

Witness my hand and the Seal of said Court at Lincoln, in said District, this 28th day of March, 1932.

R. C. HOYT,
Clerk,
By J. B. NICHOLSON,
Deputy.

[SEAL.]

UNITED STATES OF AMERICA,
District of Nebraska,
Omaha Division, ss:

I, Joseph W. Woodrough, Judge of the District Court of the United States within and for the District aforesaid, the same being a court of record, do hereby certify that R. C. Hoyt is clerk of said court, and was such clerk at the time of making and subscribing the foregoing certificate, and that said J. B. Nicholson, who executed said certificate on behalf of his principal, was at the time of executing the same, a duly appointed, qualified, and now is an acting deputy clerk within and for said district and division, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Omaha, Nebraska, this 29 day of March, 1932.

(Signed) J. W. WOODROUGH,
Judge of the District Court of the United States for the District of Nebraska.

UNITED STATES OF AMERICA,
District of Nebraska,
Omaha Division, ss:

I, R. C. Hoyt, Clerk of the District Court of the United States within and for the District of Nebraska, do hereby certify that Joseph W. Woodrough, whose name is subscribed to the foregoing certificate was, at the time of subscribing the same, Judge of the District Court within and for the District aforesaid, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at Omaha in said District and Division this 29th day of March, 1932.

R. C. HOYT,
Clerk.

(Signed) By JOHN NICHOLSON,
[SEAL.] *Deputy.*